



Legislative Bulletin.....December 15, 2005

Contents:

H.R. 4437 — Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: several

Total Cost of Discretionary Authorizations: \$2.093 billion over five years

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: several

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 4437 — Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 — *as reported* (Sensenbrenner, R-WI)

Order of Business: The bill is scheduled for consideration on Thursday, December 15, 2005, subject to at least two separate structured rules: one reported this morning, and one likely to be reported later today. Only those amendments preprinted in the rule will be considered.

Summary: H.R. 4437 directs the Department of Homeland Security to achieve and maintain operational control over the entire international border; requires various reports on border security and immigration measures to Congress; increases penalties for alien smuggling and entering the U.S. illegally, for overstaying a visa, and for failing to depart when directed to do so; requires mandatory detention of aliens apprehended within 100 miles of the border; authorizes local sheriffs in counties along the southern border to enforce immigration laws; and establishes an employment verification system to ensure that current and future employees are

authorized to work, and makes dozens of other modifications to current border security and enforcement laws. Highlights of the bill by title and section are as follows:

TITLE I: Securing United States Borders.

- Directs the Secretary of the Department of Homeland Security (DHS) to take all actions “necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders” of the U.S., including:
 - 1) systematic surveillance of U.S. borders “through more effective use of personnel and technology, such as unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras;”
 - 2) physical infrastructure enhancements to prevent unlawful entry, including additional checkpoints, all weather access roads, and vehicle barriers;
 - 3) hiring and training “as expeditiously as possible” additional border patrol agents; and
 - 4) increasing deployment of U.S. Customs and Border Protection personnel to areas along international borders where there are high levels of illegal entry.
- Directs the DHS to submit a two report to Congress within six months on a comprehensive plan for systematic surveillance of the international borders of the U.S.; it also requires a report to Congress within one year on a national strategy for border security;
- Directs the DHS to submit a report to Congress on the implementation of the cross-border security agreements signed by the U.S. with Mexico and Canada, to include recommendations on improving cooperation with such countries to enhance border security;
- Directs the DHS to enhance connectivity between two national fingerprint databases (IDENT and IAFIS), and requires DHS (in consultation with the State Department) to collect all fingerprints from each alien required to provide fingerprints during the alien’s initial enrollment in the entry and exit system (as described in section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996);
- Directs the DHS to submit a report to Congress within six months on the benefits of the One Face at the Border Initiative established by the DHS, to include goals and challenges to increased effectiveness and certain other items;
- Directs the DHS to develop and implement a plan for secure two-way communication capabilities among all border patrol agents and various other border security personnel and related entities;
- Directs the DHS to increase the number of full-time active-duty port of entry inspectors by at least 250 each year from FY07-FY10, “subject to the availability of appropriations;” authorizes to be appropriated “such sums as may be necessary” for each fiscal year to “hire, train, equip, and support” such additional inspectors;
- Directs the DHS to increase by 25 percent the number of trained detection canines for use at U.S. ports of entry and all international borders each year from FY07-FY11;
- Directs the DHS Inspector General to review each contract related to the Department’s Secure Border Initiative valued at \$20 million or over, in order to determine whether each contract complies with the “cost requirements, performance objects...inclusion of small, minority, and women-owned business, and timelines;” subsequently directs the DHS Secretary to report to Congress on the findings of the report; authorizes to be appropriated to the Office of the Inspector General an additional five percent for FY07

(over what would otherwise be appropriated), at least six percent more for FY08, and at least seven percent more for FY09;

- Directs the U.S. Comptroller General to conduct a review of the basic training provided to border patrol agents by DHS, and specifies the components of the review;
- Directs the DHS to reimburse property owners for costs associated with repairing damages to the property owners' private infrastructure constructed on a U.S. government right-of-way when such damages are a result of unlawful entry of aliens and confirmed by DHS personnel and submitted for reimbursement; authorizes to be appropriated an initial \$50,000 for each fiscal year (ongoing) to carry out this provision;
- Directs the DHS to establish at least one border security unit for the U.S. Virgin Islands;
- Directs the DHS to report to Congress on the progress of tracking Central American gang travel across the U.S./Mexico border; and
- Directs the DHS to deploy radiation portal monitors at all U.S. ports of entry for screening all inbound cargo for nuclear and radiological material; authorizes to be appropriated such sums as may be necessary for FY06-FY07 to carry out this provision.

TITLE II: Combating Alien Smuggling and Illegal Entry and Presence.

- Provides for mandatory minimum sentences on alien smuggling convictions, and expands property seizure and forfeiture authority of DHS;
- Amends the definition of aggravated felony contained in the Immigration and Nationality Act (INA) to include all smuggling offenses, illegal entry, and reentry crimes; makes the aggravated felony definition consistent with federal criminal law by expanding it to include solicitation and assistance in specified offenses; according to the Committee Report, the INA currently "broadly defines the term aggravated felony in over 20 subparagraphs;"
- Further clarifies the definition of "aggravated felony" to include "soliciting, aiding, abetting, counseling, commanding, inducing, procuring" or a conspiracy to commit any of the offenses listed in section 101(a)(43) of the INA; according to the Committee Report, this change is intended to "reverse a Ninth Circuit precedent that has had the effect of requiring Federal prosecutors in criminal cases seeking sentencing enhancements to prove that prior convictions were *not* based on aiding and abetting;"
- Makes all smuggling convictions aggravated felonies, with the exception of smuggling related to an alien's immediate family;
- Makes it a federal crime to be in the U.S. illegally and expands the penalties for aliens entering illegally, and expands the penalties for marriage and immigration-related entrepreneurship fraud; aligns to related INA provisions (sections 275 and 276) regarding illegal entry, amending 275 to state that it is a crime for an alien to be "present in the United States in violation of the immigration laws or regulations prescribed thereunder."
- Makes it a federal crime for an alien to overstay their visa;
- Sets mandatory minimum sentences for aliens convicted of reentry after removal (providing for one, five, or ten year minimum sentences for various circumstances);
- Imposes the same mandatory minimum sentences on smugglers that the aliens who were smuggled are subject to;
- Makes it a federal crime to carry or use a firearm in the commission of violent or drug trafficking crimes (current law does not address alien smugglers who use firearms in the commission of the crime);

- Clarifies that current provisions that prohibit entry to aliens who have made false claims regarding U.S. citizenship to also apply to aliens who make false claims regarding U.S. nationality;
- Modifies the “voluntary departure” process to provide incentives for aliens to depart under the terms of the voluntary departure order; under current law, aliens may agree to voluntarily depart (thus, saving the government the money to issue a formal removal order and provide transportation), but many aliens reportedly use this procedure to delay or avoid departure; imposes a penalty of \$3,000 on aliens who fail to depart and imposes a 10-year moratorium on reentry, and imposes various other penalties and restrictions on aliens who fail to depart;
- Modifies the rules governing aliens that are ordered to be removed, and further restricts the ability of aliens to delay removal or to avoid the penalties associated with not doing so; for aliens who fail to depart, establishes increased punitive measures that restrict the aliens future reentry (in the hopes of providing an incentive for compliance); and
- Directs the DHS to establish a task force collect, maintain, and disseminate information regarding fraudulent documents used by aliens to enter the U.S. unlawfully.

TITLE III: Border Security Cooperation and Enforcement.

- Directs the DHS to develop a joint strategic plan to increase the availability of DoD surveillance equipment, to assist DHS with international border security; requires a report to Congress within six months of enactment on the plan and a description of the equipment to be used; based on the above evaluation, directs the DHS to provide “appropriate border security assistance on land directly adjacent to the international borders;”
- Directs the DHS to design and carry out a national border security exercise, involving state and local governments and private sector representatives; stipulates that the exercise must test and evaluate the capacity of the U.S. to anticipate, detect, and disrupt threats to U.S. borders;
- Directs the DHS to establish an advisory committee (the Border Security Advisory Committee), and provides that the committee will advise the Secretary on issues relating to border security and enforcement along the international border of the U.S.;
- Gives DHS the authority to allow Homeland Security grants to be used for border security activities;
- Establishes a university-based Center of Excellence for Border Security, and outlines the activities of the Center; and
- States the sense of Congress that DHS should strive to include, as part of the National Strategy for Border Security, recommendations on how to advance DHS cooperation with sovereign Indian nations on securing U.S. borders.

TITLE IV: Detention and Removal.

- Requires the mandatory detention of aliens that are apprehended at or between ports of entry, beginning on October 1, 2006; the alien will be detained until removed or a final decision regarding grant admission has been determined, unless the alien departs from the U.S. or the DHS Secretary paroles the alien due to “urgent humanitarian reasons or significant public benefit;”

- Provides for certain conditions under which an alien may be released during the interim period: 1) DHS determines that the alien does not pose a national security risk, and 2) the alien provides a bond of not less than \$5,000;
- Directs the DHS to fully utilize all available detention facilities operated or contracted by the DHS and utilize all possible options to cost effectively increase available detention capacities including the use of temporary facilities, state and local correctional facilities, private space, and other secure alternatives to detention;
- Authorizes the DHS to enter into contracts with private entities to provide domestic transport of aliens (from Customs and Border Protection to detention facilities) who are apprehended near international borders; stipulates certain criteria for selection of private transport entities;
- Allows the DHS (in consultation with the Secretary of State) to deny admission to nationals from countries that deny or delay accepting deported aliens (who are citizens of such country) from the U.S.;
- Directs the DHS to provide a report to Congress that details the cost to DHS of repatriation of unlawful aliens to their countries of nationality or last habitation;
- Directs the DHS to review and evaluate the training provided to border patrol agents and port of entry inspectors regarding the inspection of aliens to determine whether an alien is referred for an interview by an asylum officer for a determination of credible fear; also directs the DHS to take necessary measures to ensure consistency in referrals by Border Patrol agents and port of entry inspectors to asylum officers for determinations of credible fear; and
- Imposes expedited removal on all undocumented immigrants in the U.S. apprehended at or between an international land border or within 100 miles of that border.

TITLE V: Effective Organization of Border Security Agencies.

- Directs the DHS to ensure full coordination of border security efforts among the various federal agencies;
- Directs the DHS to oversee and ensure the coordinated execution of border security operations and policy; establishes a mechanism for sharing intelligence information and analysis pertaining to counter-terrorism, border enforcement, customs and trade, immigration, human smuggling, human trafficking, and other issues;
- Establishes DHS task forces as necessary to better coordinate border enforcement and the disruption and dismantling of criminal organizations engaged in cross-border smuggling, money laundering, and immigration violations;
- Establishes within the DHS the Office of Air and Marine Operations, headed by a new Assistant Secretary to be appointed by the President; defines the mission of the office to be the prevention of the entry of terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband into the U.S.;
- Transfers all functions of the Customs Patrol Officers unit operating on the Tohono O’odham Indian Reservation (commonly known as the “Shadow Wolves” unit) to U.S. Immigration and Customs Enforcement (USCIS); and
- Establishes within USCIS new units of Customs Patrol Officers.

TITLE VI: Terrorists and Criminal Aliens.

- Prohibits aliens that are deportable on terrorist grounds from receiving withholding of removal (similar to asylum, it allows an alien to continue living and working in the U.S.); under current law, aliens are only barred from receiving withholding if there are reasonable grounds to believe that they are a danger to the security of the U.S.
- Allows DHS to detain specified dangerous aliens who are under orders of removal but cannot be removed for other reasons; authorizes DHS to detain aliens who are stopped at the border beyond six months, as current law allows; specifically, authorizes DHS to detain aliens who beyond six months, but only if:
 - 1) the alien will be removed in the reasonably foreseeable future;
 - 2) the alien would have been removed but for the alien's refusal to make all reasonable efforts to comply and cooperate with the Secretary of DHS efforts to remove him;
 - 3) the alien has a highly contagious disease;
 - 4) release would have serious adverse foreign policy consequences;
 - 5) release would threaten national security; or
 - 6) release would threaten the safety of the community and the alien either is an aggravated felon or is mentally ill and has committed a crime of violence. Such aliens may be detained for periods of 6 months at a time, and the period of detention may be renewed.
- Provides for judicial review of detention decisions in the U.S. District Court for the District of Columbia;
- Increases penalties and sets mandatory minimum and maximum sentences for aliens who fail to depart when ordered removed, obstruct their removal, or who fail to comply with the terms of release pending their removal (based on difference offenses, sets minimums of six months or one year);
- Prohibits aliens with aggravated felony convictions who are in the U.S. illegally to receive a waiver for removal from the U.S. (currently allowed through a loophole); prohibition of granting a waiver also applies to aliens convicted of crimes of domestic violence, stalking, child abuse, and child neglect from entering and remaining in the United States; also prohibits admission of aliens who have committed or been convicted of crimes relating to Social Security fraud or the unlawful procurement of citizenship.
- Prohibits asylees and refugees convicted of aggravated felonies from being granted asylum (currently allowed through a loophole);
- Allows the deportation of aliens convicted of three or more drunk driving offenses (not currently grounds for removal);
- Authorizes local sheriffs in 29 specific counties along the southern border to transfer illegal aliens they have arrested into federal custody; provides for reimbursement to those sheriffs for costs associated with illegal alien detainment prior to their transfer to federal authorities; the account used for reimbursements is authorized to receive up to \$100 million per year;
- Authorizes deportation of alien gang members; currently, aliens who are members of criminal street gangs are not deportable or inadmissible, and can receive asylum and temporary protected status (TPS), until they are convicted of a specific criminal act;
- Prohibits persons from being naturalized whom the DHS Secretary determines to have been in removal proceedings; currently, alien terrorists are deportable and are also barred from admission and most other forms of immigration relief, but are not expressly barred

from being naturalized (a procedure under which aliens can become citizens if they have resided within the U.S. for five years and have not left the U.S. within that period for more than 30 months or twelve consecutive months);

- Authorizes the DHS to use the same expedited procedures available for the removal of aggravated felons to remove other inadmissible criminal aliens who entered illegally and who are otherwise ineligible for relief. Currently; these aliens must be placed in removal proceedings before an immigration judge, though they are not eligible for any relief, resulting in delayed deportation;
- Clarifies that the amendments in the terrorist grounds of removal in the REAL ID Act may be applied to aliens in all removal, deportation, and exclusion cases, regardless of when those cases were initiated;
- Expands the definition of “good moral character” to specifically exclude terrorists; currently, the term’s definition specifically excludes such individuals who are “habitual drunkards,” but not terrorists; thus, terrorists would automatically be ineligible for immigration benefits, including naturalization, voluntary departure, and cancellation of removal.
- Modifies the definition of “aggravated felony” in the INA to cover manslaughter and homicide; thus, aliens who have caused the death of another (but not specifically committed murder or certain crimes of violence which are currently covered in the definition) are now covered by the “aggravated felony” definition; also allows extrinsic evidence to be offered to establish the minority of the victim in a sexual abuse case; also defines sexual abuse of a minor as an aggravated felony for immigration purposes; and
- Allows the deportation of aliens who have unlawfully obtained citizenship as well as aliens convicted of offenses relating to misuse of Social Security numbers, cards, and fraud in connection with identification documents.

TITLE VII: Employment Eligibility Verification.

- Directs the DHS to establish and administer a verification system which would respond to inquiries (via telephone or other electronic media) concerning an individual’s identify and whether the individual is legally employable;
- Provides for: (1) voluntary employer verification utilizing such system two years after enactment of this Act for previously hired individuals; (2) mandatory employer verification three years after enactment of this Act by federal, state, and local governments, and the military for employees not verified under such system working at federal, state or local government buildings, military bases, nuclear energy sites, weapons sites, airports, or critical infrastructure sites; and (3) mandatory employer verification six years after enactment of this Act for all employees (new and existing) not previously verified under such system;
- Provides for penalties for employers for noncompliance, and stipulates actions and consequences of non-verification for employers and employees; and
- Requires employer participation in the basic pilot program within two years after enactment of this Act.

TITLE VIII: Immigration Litigation Abuse Reduction.

- Redefines the term “order of removal.” Changes to current law are indicated in **bold red**.
A) The term “order of deportation” means the order of the **special inquiry officer immigration judge, the Board of Immigration**, or other such administrative officer to whom the Attorney

General or the **Secretary of Homeland Security** has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is **deportable removable** or ordering deportation.

- B)** The order described under subparagraph (A) shall become final upon the earlier of—
- i)** a determination by the Board of Immigration Appeals affirming such order; ~~or~~
 - ii) the entry by the Board of Immigration Appeals of such order**
 - iii)** the expiration of the period in which the **alien party** is permitted to seek review of such order by the Board of Immigration Appeals;
 - (iv) the entry by an immigration judge of such order, if appeal is waived by all parties; or**
 - (v) the entry by another administrative officer of such order, at the conclusion of a process as authorized by law other than under section 240.**

This provision, which is meant to clarify current law regarding court order of removals, takes effect on the date of enactment of this Act;

- Adds to current law that (notwithstanding current law) any revocation of an individual's visa may not be reviewed by any court, and no court shall have jurisdiction to hear any claim arising from or any challenge to, such a revocation. This provision takes effect on the date of enactment of this Act and applies visa revocations effected before, on, or after that date;
- Clarifies current law, which provides that after the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, revoke such visa or other documentation. Notice of such revocation is to be communicated to the Attorney General, and this action is to invalidate the visa or other documentation from the date of issuance;
- Provides that if an alien has reentered the United States illegally after having been removed under an order or removal, deportation, or exclusion, regardless of the date of the original order or the date of illegal entry, the order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief provided for in this Act, and the alien is to be removed at any time after the illegal entry;
- Clarifies current law, which states, "if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief, and the alien shall be removed under the prior order at any time after the reentry;"
- Provides for these cases, the same judicial review provision as provided for visa revocation, which provides, no court is to have jurisdiction to hear any claim arising from or any challenge to, relating to any rein-statement, including any challenge to the reinstated order;
- Amends current law to clarify that the burden of proof is on the alien to establish that the alien's life or freedom would be threatened in that country, and that race, religion, nationality, membership in a particular social group, or political opinion would be at least one central reason for such threat; under current law, the Attorney General (AG) may not remove an alien to a country if he decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. This provision clarifies that the burden to prove this, rests upon the alien;

- Releases the federal courts from the current requirement of filing reply briefs to briefs filed by aliens in connection with a petition for judicial review. In addition, the measure sets in place the process by which briefs filed by aliens are to be reviewed by the courts;
- Creates a more efficient system for the judicial review of petitions filed by aliens. According to the Committee, aliens sometime file these petitions in order to drag out their stay in the United States. This provision is designed to shorten the process in reviewing these briefs;
- Provides that an alien may not be issued a nonimmigrant visa unless the alien has waived any right—
 - “to review or appeal under this Act of an immigration officer’s determination as to the inadmissibility of the alien at the port of entry into the United States; or
 - “to contest, other than on the basis of an application for asylum, any action for removal of the alien.”
- Currently, many non-immigrants residing in the U.S. passed their legally allotted period of time are permitted to file a petition and have a hearing before an immigration judge. According to the Committee, most of the time these hearings are held and then the appeal is denied. This provision outlines that if you come to the U.S. as a nonimmigrant, you waive your right to have a removal hearing.

Administration Policy: A Statement of Administration Policy (SAP) was not available at press time.

Amendments: Amendments made in order under the rule will be summarized in a separate RSC document.

Committee Action: H.R. 4437 was introduced on December 6, 2005, and referred to the Committee on Judiciary. The bill was considered and marked up on December 8, 2005, and it was reported to the House by a vote of 23-15.

Cost to Taxpayers: CBO estimates that implementing H.R. 4437 would authorize \$296 million for FY06 and \$2.093 billion over the 2006-2010 period. CBO states that “such costs would continue and grow significantly after 2010 as additional requirements of the bill would be implemented. Enacting the bill could affect direct spending and revenues, but we estimate that any such effects would not be significant.”

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, as noted above, H.R. 4437 creates and expands federal criminal penalties for various immigration violations, and creates a new employer verification system, among other things.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes. CBO states that H.R. 4437 would “impose intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act (UMRA), on employers and other entities that hire, recruit, or refer individuals for employment. CBO expects that the aggregate direct costs to comply with those mandates would exceed the annual threshold for both intergovernmental and private-sector mandates (\$62 million for intergovernmental mandates in

2005 and \$123 million for private-sector mandates in 2005, adjusted annually for inflation) in at least one of the first five years the bill is in effect.”

Other provisions of the bill contain no intergovernmental or private-sector mandates; some would benefit local governments.

Constitutional Authority: The Committee Report, [109-345](#) Part 1, cites constitutional authority for this legislation in Article 1, Section 8, and Clause 4 (rules of naturalization) of the Constitution.

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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